No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Foreign Trade Council ("NFTC") is the premier business organization advocating for public policies to foster open, rules-based international trade and investment. Founded in 1914 by a group of American companies that supported an open-world trading system, the NFTC and its affiliates now serve more than 300 member companies. Its fifty-member board of directors includes some of America's largest and most iconic businesses, spanning all sectors of the economy—from Google to Wal-Mart, Coca Cola to Ford, Chevron to Pfizer.

SUMMARY OF ARGUMENT

Five years ago, in *Morrison v. National Australia Bank Ltd.*, this Court unambiguously held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. 247, 255 (2010). Three years later, this Court reaffirmed that holding in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). In *Morrison* and *Kiobel*, the Court stressed that the presumption against the extraterritorial application of United States law (the "Extraterritoriality

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

Presumption") prevents the United States from turning into a "Shangri-La" for plaintiffs' lawyers', by closing the courts to claims that have little, if any, connection to the United States. Without the Presumption, plaintiffs' lawyers from around the world would be free to use the American judicial system—with its class actions, broad and protracted discovery, and no "loser-pays" rules—to bring claims for injuries suffered abroad as a result of foreign conduct, even when the conduct in question is not actionable in the jurisdiction where it occurred.

The Second Circuit's decision below undoes much of what *Morrison* and *Kiobel* accomplished in limiting the extraterritorial reach of U.S. law. Permitted to stand, the Second Circuit's holding would, for the first time, open U.S. courts to claims by *foreign* plaintiffs suing for *foreign* injuries caused by *foreign* conduct perpetrated by a *foreign* enterprise. That result is precisely what *Morrison* and *Kiobel* sought to avoid.

This is not a theoretical concern. On the contrary, the present case proves the point. Here, rather than bringing an action in their own courts, foreign governments seek to sue in the United States under United States law for injuries purportedly suffered in Europe as a result of conduct committed in Europe by various foreign actors. Left undisturbed, the Second Circuit's decision to allow this action to proceed will task the U.S. court system with the function of adjudicating worldwide claims of corporate misconduct under U.S. law, even though the conduct giving rise to the litigation may not be actionable in the jurisdiction where it occurred. This Court has previously rejected exactly such an extraterritorial application of U.S. law: "to apply our remedies would

unjustifiably permit [foreign] citizens to bypass their own [countries'] less generous remedial schemes . . . ." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004).

Amicus respectfully submits that the Second Circuit's decision should be reversed for at least three reasons. *First*, the Second Circuit improperly held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (2012), has extraterritorial application to the extent that one of its predicate statutes has extraterritorial reach. That holding is at odds with both this Court's clear holdings in *Morrison* and *Kiobel*, as well as decades-long precedent that RICO is silent as to any extraterritorial application. *Amicus* thus endorses Petitioner's argument that, under *Morrison*, RICO lacks extraterritorial reach and can be invoked only where, unlike here, the claim is based on the conduct of a domestic enterprise. *See infra* Part I.

Second, even if the Court rejects that contention, the Second Circuit's decision still should be reversed because RICO's private right of action, codified in Section 1964(c), requires the showing of a domestic injury. Section 1964(c)'s plain text and legislative history make clear that in enacting Section 1964(c), Congress was focused on remedying injuries caused by violations of RICO. As Section 1964 is silent as to its extraterritorial reach, it has none. Therefore, a viable civil RICO claim must establish a domestic injury for which the plaintiffs seek recovery. *See infra* Part II.A-B. The Second Circuit's reasoning that Section 1964(c)'s reach should extend to any injury, wherever suffered, caused by a violation of a RICO predicate that has extraterritorial reach, is unpersuasive because this Court's precedent

(i) requires that the extraterritorial reach of each statutory provision be considered independently, (ii) makes clear that RICO's predicates are separate from RICO itself, and (iii) establishes that even where a conduct-regulating law has extraterritorial reach, there is no private right of action in U.S. courts for a violation of that law unless the procedural statute creating the private right of action also has extraterritorial application. *See infra* Part II.C. Moreover, the legislative history of RICO's extraterritorial predicates, relied on by the Second Circuit, also supports the rejection of the Second Circuit's approach. *See infra* Part II.D.

Third and finally, limiting Section 1964(c)'s reach to domestic injuries is consistent with the policy considerations endorsed by this Court in *Morrison* and *Kiobel*. As a threshold matter, under the Second Circuit's ruling, many of the claims that the Supreme Court found to be barred by the Extraterritoriality Presumption in *Morrison* and *Kiobel* could now be resurrected as RICO claims. Were this to happen, it would lead to the absurd result that the Extraterritoriality Presumption barred certain claims but permitted civil RICO claims based on the same foreign conduct, with the result that NFTC's members' exposure to such claims would increase threefold. This is certainly not what RICO—a statute designed to combat the impact of organized crime in the United States—was meant to accomplish. *See infra* Part III. Nor can it be the result contemplated by this Court in *Morrison* and *Kiobel*.

Moreover, interpreting Section 1964(c) to permit claims based on foreign injuries would impose significant burdens on U.S. companies doing business abroad, as well as foreign businesses choosing to

invest in the United States. This is particularly troubling here, since RICO is, on the one hand, so broad that almost any tort claim can be asserted as a RICO claim and, on the other hand, provides for damages so severe as to be considered by some courts the equivalent of a "thermonuclear device" of civil litigation. This Court should decline Respondent's invitation to convert this nation's courts into quasi-global courts permitted to adjudicate claims that have little, if any, connection to the United States.

ARGUMENT

I. *Amicus* Agrees With Petitioners That A Cognizable RICO Claim Requires A Showing Of A Domestic Enterprise

Amicus endorses Petitioners' contention that Section 1962, which contains RICO's substantive prohibition, does not extend to foreign enterprises. *See* Pet'rs' Br. 24-38. This conclusion is dictated by RICO's plain language, which numerous lower courts have found to be "silent" as to the statute's extraterritorial reach. *See United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013) ("RICO is silent as to its extraterritorial application. . . . [Therefore, as o]ther Courts that have addressed the issue have uniformly held . . . RICO does not apply extraterritorially."); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010) ("[Second Circuit] precedent holds that RICO is silent as to any extraterritorial application." (internal quotation marks omitted)); *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("[RICO] is silent as to any extraterritorial application."). Accordingly, under this Court's holdings in *Morrison* and *Kiobel*, RICO

lacks any extraterritorial application. *See Morrison*, 561 U.S. at 255; *Kiobel*, 133 S. Ct. at 1664.

Applying *Morrison*'s framework, determining whether a particular application of RICO is appropriately domestic, or impermissibly extraterritorial, requires identifying Congress's "focus" in passing Section 1962. *Morrison*, 561 U.S. at 266-67. Thus, when the transaction or act that is the object of the statute's solicitude occurs in the United States, the application of the statute is appropriately domestic, even if the law suit otherwise involves extraterritorial activity. *See id.* at 267.

As Petitioners have demonstrated, Pet'rs' Br. 24-38, Section 1962's focus is on the corruption of an "enterprise," not the predicate acts by which the corruption is achieved. Indeed, this Court has previously observed that RICO's "primary purpose" was to address the corruption of businesses—i.e. enterprises—by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981); *see also United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("The central role of the concept of enterprise under RICO cannot be overstated."); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010) (Rakoff, J.) ("[T]he focus of RICO is on the enterprise" and "nowhere does [RICO] evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality."). Accordingly, a viable RICO action requires the showing of a domestic "enterprise." *See Morrison*, 561 U.S. at 266-67.

The "enterprise" test is superior to a test focusing on RICO's predicates or a defendant's pattern of conduct because it best serves the goals of

determinacy and predictability. *See id.* at 256 (criticizing the Second Circuit's conduct-and-effects test as "complex in formulation and unpredictable in application"). The usability of the "enterprise" test, established by identifying the enterprise's nerve center (where the decisions to engage in the offending conduct were made, *see Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010)), would provide courts and litigants with a clear and definitive standard for determining which entities are subject to RICO claims (those with a nerve center located in the United States) and which were not (those with a nerve center located outside of the United States). *See id.* at 95; *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (observing that a corporation's primary place of business (i.e., its nerve center) is easily ascertainable).

II. Even If The Court Finds That RICO Does Not Require A Showing Of A Domestic Enterprise, The Second Circuit's Decision Should Be Reversed Because A Civil RICO Claim Requires The Showing Of A Domestic Injury

Even if the Court does not construe RICO as governing only domestic enterprises, the Second Circuit's decision should be reversed because whatever the extraterritorial reach of RICO's criminal prohibition, recovering on a civil RICO claim requires the showing of a domestic injury.

RICO's Section 1964(c) permits "[a]ny person injured in his business or property by reason" of a RICO violation to sue "in any appropriate United States district court" and, if the claim is successful, to recover treble damages and attorneys' fees. 18 U.S.C.

§ 1964(c). Applying *Morrison* to determine the appropriate territorial reach of RICO's private right of action requires courts to identify Section 1964(c)'s focus. 561 U.S. at 266-67. Each of Section 1964(c)'s plain language, applicable precedent, and legislative history compels the conclusion that in creating a private right of action under RICO, Congress was focused on remedying "injuries" caused by RICO's violations. Thus, because Section 1964(c), like the rest of RICO, reflects no clear congressional intent that it apply extraterritorially, a plaintiff cannot sustain a civil RICO action unless it has suffered an injury in the United States.

A. The Plain Language Of Section 1964(c) Requires The Showing Of A Domestic Injury

Section 1964(c)'s plain text shows that its focus is on an "injur[y]" caused by a RICO violation. Specifically, Section 1964(c) affords "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter" a right of action in United States courts. 18 U.S.C. § 1964(c). The focus, then, is not on the substance of a RICO violation, which is addressed by Section 1962, but on the injury suffered as a result of that violation. Indeed, the sole purpose (i.e., focus) of Section 1964(c) is to provide something that Section 1962 does not provide: an opportunity for a private party to redress injury incurred as a result of a RICO violation. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 183 (1997) (Section 1964 is a "special . . . provision" permitting those "injured" by a criminal violation of RICO "to recover treble damages and attorney's fees"). Thus, Section 1964(c)'s plain language demonstrates that the remedial focus of Section 1964(c) is on the injury

caused by a RICO violation, rather than the violation itself. *See Morrison*, 561 U.S. at 266-67 (Section 10(b) is focused not on the fraud or deception in connection with the purchase or sale of the security, but on the *purchase or sale of the security occasioned by the fraud*).

Not surprisingly, this Court and several lower courts have reached precisely this conclusion. For example, in *Shearson/American Express, Inc. v. McMahon*, this Court examined the purpose of Section 1964(c) at length and found that in passing Section 1964(c), the "'focus' of Congressional concern," *Morrison*, 561 U.S. at 266, was Section 1964(c)'s "remedial function." *Shearson*, 482 U.S. 220, 241 (1987). That is, in enacting Section 1964(c), Congress was focused on the ability of those *injured* by criminal conduct to obtain a civil remedy. *Id.* at 240-41.[2]

Several courts considering RICO's extraterritorial reach appear to have reached the same conclusion. For example, in *Norex*, the Second Circuit held that even though U.S.-based actors engaged in U.S.-based conduct, the plaintiff's civil RICO claim was barred by the Extraterritoriality Presumption because the alleged injury occurred outside of the United States.

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[2] Respondent's argument below—that a civil RICO claim need not be based on a domestic injury because Section 1964(c)'s focus is on the policing function of turning "victims" "into prosecutors," Reply Brief for Plaintiff-Appellants at 23, *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014) (No. 11-2475-cv)—is also foreclosed by *Shearson*, in which the Court expressly found that this policing function "was a secondary concern" and that Congress' primary focus was on providing victims a remedy for their injuries. 482 U.S. at 240-41.

631 F.3d at 33. Specifically, the injury occurred in the Russian Federation, where Norex was deprived of its ownership stake in a Russian oil company and certain quantities of oil owed to it by various Russian entities. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 440 (S.D.N.Y. 2007). Noting that *Norex* involved a "private lawsuit pursuant to 18 U.S.C. § 1964(c)," the Second Circuit dismissed the civil RICO claim as barred by the Extraterritoriality Presumption. 631 F.3d at 33. While the Second Circuit did not expressly ground its dismissal of the complaint on the lack of a domestic injury, it must have done so as the complaint alleges both a domestic enterprise and a number of predicate acts occurring in the United States. *Id.* at 31.[3] Similarly, in *Cedeño v. Castillo*, in which the plaintiffs alleged purely foreign injuries, the Second Circuit affirmed dismissal of their civil RICO claims as barred by the Extraterritoriality Presumption despite plaintiffs' express argument that the claims were based on violations of predicate offenses that had extraterritorial reach. 457 F. App'x. 35 (2d Cir. 2012). Section 1964(c)'s language and applicable

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[3] Furthermore, the Second Circuit expressly limited its holding to civil RICO claims brought under Section 1964(c), stating that it "express[ed] no opinion" on the extraterritorial reach of RICO claims brought by the government under Sections 1963, 1964(a) or 1964(b). *Norex*, 631 F.3d at 33. Like Section 1964(c), these sections of RICO incorporate by reference Section 1962, and, through it, the various predicate statutes. Therefore, the Second Circuit's decision in *Norex* must have been based on a unique part of Section 1964(c) that is not present in Sections 1963, 1964(a), or 1964(b)—the requirement that a plaintiff show "an injury." *See Clark v. Martinez*, 543 U.S. 371, 386 (2005) (Judges cannot "give the same statutory text [here, section 1962] different meanings in different cases").

precedent establish that its focus is on remedying an injury suffered as a result of a RICO violation, and therefore a viable civil RICO claim requires the showing of a domestic injury.

B. Section 1964(c)'s Legislative History Confirms That Section 1964(c) Requires A Showing Of A Domestic Injury To Make Out A Civil RICO Claim

Because Section 1964(c)'s plain language compels the conclusion that a domestic injury is required, there is no need to consider legislative history. *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Nevertheless, Section 1964(c)'s legislative history confirms the same result. As a threshold matter, nothing in Section 1964(c)'s legislative history suggests that Congress intended Section 1964(c) to open U.S. courts to foreign plaintiffs seeking redress for foreign injuries. The opposite is true. Congressional records surrounding RICO's enactment consistently and exclusively focus on the impact that organized crime had *in the United States*, not outside of it. For example, RICO's statement of findings and purpose expressly states that "[i]t is the purpose of this Act to seek the eradication of organized crime *in the United States*." Pub. L. No. 91-452, 84 Stat. 922, 923 (emphasis added); *see also* 115 CONG. REC. 9568 (1969) (discussing RICO's immediate predecessor, and noting that "the declared policy of the Congress [is] to eradicate the baneful influence of organized crime in the *United States*") (emphasis added).

Limiting Section 1964(c)'s reach to encompass only claims seeking damages for domestic injuries is also consistent with the legislative model Congress used to craft RICO's civil-remedy provision. As this Court has

"repeatedly observed," Congress modeled § 1964(c) on the "civil-action provision of the federal antitrust laws." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267 (1992); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) ("The clearest current in [RICO's] history is the reliance on the [antitrust] model."). Importantly, the antitrust civil-remedy provision, on which Section 1964(c) was modeled, has "long" been interpreted as only permitting claims that "redress *domestic* antitrust injury." *Empagran*, 542 U.S. at 165 (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.)); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (permitting antitrust claim based on foreign anticompetitive conduct to go forward because prohibited conduct resulted in antitrust injury in the United States); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982) (no civil antitrust remedy in United States to redress antitrust injury suffered only in Canada).[4] As there is nothing in Section 1964(c)'s legislative history to suggest that, in crafting a civil RICO remedy, Congress intended to give Section 1964(c) a scope far exceeding the antitrust laws on which it was modeled, Section 1964(c) should be interpreted as authorizing a private right of action to redress only domestic, not foreign, injuries.

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[4] While *Empagran* interpreted the Foreign Trade and Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (2012), a statute that is sometimes described as limiting the reach of the Sherman Act, it recognized that "no pre-1982 case provides significant authority for [the] application" of the Sherman Act's private right of action to redress purely foreign injury. *See Empagran*, 542 U.S. at 173.

C. Nothing Rebuts The Presumption That In Passing Section 1964(c), Congress Was Focused Only On Remedying Domestic Injuries

In sum, Section 1964(c)'s plain language, legislative history and applicable precedent all support limiting Section 1964(c) to claims seeking redress for domestic, but not foreign, injuries. The Second Circuit's holding to the contrary—based on the notion that the existence of extraterritorial predicates means that a showing of a domestic injury is not required[5]—fails for at least three independent reasons.

First, in determining which law suits fall within the territorial scope of Section 1964(c), the proper focus is on Section 1964(c), not on RICO as a whole, and certainly not on the dozens of separate statutes that make up RICO's predicates. *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 292 (2010) (when identifying the focus of a statutory provision, courts should look to the provision itself, not the statute as a "whole"). Indeed, this Court has held that each statutory provision should be considered separately when determining its focus, as different statutory provisions may have different scopes and different objectives. *See, e.g.*, *Morrison*, 561 U.S. at 263-65 (focus of Exchange Act's Section 10(b) is different from that of Section 30); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (focus of Foreign Sovereign Immunities Act's commercial-activity exception is broader than tortious-act exception).

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[5] Pet. App. 11a, 57a-58a.

Thus, in *Morrison* this Court noted that when Congress gives one statutory provision extraterritorial reach but fails to do so for a different statutory provision, that omission supports the conclusion that the latter provision was not intended to apply extraterritorially. *See* 561 U.S. at 265 ("Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect."); *id.* at 265 n.8 ("Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications."). Lower courts construing other statutes have held similarly. *See, e.g.*, *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. Ltd.*, 513 B.R. 222, 228-30 (S.D.N.Y. 2014) (extraterritorial reach of Section 541 of the Bankruptcy Code "cannot supply any extraterritorial authority" that Sections 547 and 548 of the Bankruptcy Code "lack on their own"); *Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 328 (S.D.N.Y. 2013) (holding that even though "[t]he Dodd-Frank Act does have some extraterritorial application," the provision at issue is "silent" as to extraterritoriality and thus does not apply extraterritorially), *aff'd*, 763 F.3d 175 (2d Cir. 2014). Likewise, here, the fact that RICO's predicates—which are separate criminal statutes enacted at different times and for different purposes than RICO—may have extraterritorial reach does not rebut the presumption that Section 1964(c) does not. *See Norex*, 631 F.3d at 33 ("*Morrison* . . . forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach."); Pet. App. 79a, n.4 (Raggi, J., dissenting) ("The money laundering and material support predicates alleged here are proscribed by criminal statutes that explicitly provide for extraterritoriality. . . . The

RICO statute, however, does not admit such a conclusion.").

Second, extending Section 1964(c)'s reach to cover extraterritorial injury because certain RICO predicates have extraterritorial reach ignores, and is inconsistent with, years of instruction from this Court and several courts of appeals to treat RICO as an offense distinct from its predicate acts. *See Sedima*, 473 U.S. at 491 (RICO predicates must be established beyond a reasonable doubt, but a civil RICO claim need only be proven by a preponderance of the evidence); *United States v. Basciano*, 599 F.3d 184, 205 (2d Cir. 2010) (prosecutions for RICO and the predicate acts are prosecutions for two separate crimes); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1097 (10th Cir. 2014) (same); *United States v. Wheeler*, 535 F.3d 446, 454 n.3 (6th Cir. 2008) (same). Indeed, it is impossible to reconcile the Second Circuit's holding—that RICO's predicates with express extraterritorial reach are part and parcel of RICO—with the longstanding jurisprudence finding that RICO is silent on its extraterritorial application. *See, e.g.*, *Chao Fan Xu*, 706 F.3d at 974 ("RICO is silent as to its extraterritorial application. . . . Other Courts that have addressed the issue have *uniformly* held that RICO does not apply extraterritorially." (emphasis added)); *see also Norex*, 631 F.3d at 32; *Al-Turki*, 100 F.3d at 1051.

Third and finally, this Court's decision in *Kiobel* further supports rejecting the approach taken by the Second Circuit. In *Kiobel*, this Court considered the extraterritorial reach of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2012), which, like Section 1964(c), authorizes a plaintiff to bring a civil action for a violation of a substantive legal norm that is

incorporated by reference. The ATS provides, in pertinent part, that United States courts "shall have original jurisdiction of any civil action . . . for a tort only, committed in violation of the law of nations." *Id.* Even though the ATS unquestionably authorizes claims substantively grounded in the law of nations (which obviously applies outside of the United States),[6] this Court nevertheless ruled that the ATS *itself* lacked extraterritorial reach. *Kiobel*, 133 S. Ct. at 1669. The Court concluded that the ATS could be invoked in U.S. courts only when there was sufficient nexus with the United States. *Id.* Similarly, here, while Section 1964(c) creates a private right of action to assert claims based on the violation of laws that are incorporated by reference, including those with extraterritorial reach, it does so if, and only if, there is a sufficient U.S. nexus—to wit, where the injury at issue occurred *in the United States*. *See id.* at 1667-69.

D. RICO's Extraterritorial Predicates Do Not Rebut The Presumption That A Claim Under Section 1964(c) Requires A Showing Of A Domestic Injury

The Second Circuit cited money laundering and terrorism-related RICO predicates that have extraterritorial reach to support its conclusion that RICO itself applies extraterritorially, such that a private plaintiff may pursue civil RICO claims based on injuries sustained abroad. Pet. App. 17a-18a.

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[6] And, indeed, piracy, which is one of the prototypical violations of the law of nations that is actionable under the ATS, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004), "typically" occurs on the high seas and so is "beyond the territorial jurisdiction of the United States." *Kiobel*, 133 S. Ct. at 1667.

But Section 1956, which criminalizes money laundering, does not—itself—afford any private right of action at all. *See* 18 U.S.C. § 1956. And nothing in Section 1956(f)'s legislative history suggests that in passing a statute criminalizing money laundering, Congress intended to create a private right of action—whether under Section 1956 or as part of a RICO claim. *See Schwartz v. F.S.&O. Assocs., Inc.*, No. 90 CIV. 1606 (VLB), 1991 WL 208056, at *2 (S.D.N.Y. Sept. 27, 1991) ("[T]here is no indication in the sparse legislative history [of Section 1956] that Congress intended these statutes to give rise to a private civil remedy. In light of the presumption against implying such remedies from criminal statutes, this is hardly surprising."). Given this Court's repeated admonitions that (i) "private rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); and (ii) a statute that provides for some extraterritorial reach must be limited to its "terms," *Morrison*, 561 U.S. at 265, the language of Section 1956, which criminalizes certain extraterritorial conduct but does not provide for a private right of action with respect to such conduct, can hardly support the extension of RICO's private right of action to cases involving extraterritorial injury.

Similarly, RICO's terrorism-related predicates do not support interpreting Section 1964(c) to authorize claims in U.S. courts on the basis of injuries suffered abroad. Respondents contend that the USA PATRIOT Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272, which added certain antiterrorism statutes with extraterritorial reach to the list of RICO predicates, supports interpreting Section 1964(c) to

permit civil RICO claims based on injuries suffered abroad. But the Patriot Act does nothing of the sort. Neither the plain language nor the legislative history of the Patriot Act supports extending RICO's private right of action to injuries suffered outside the United States from a terrorist attack that takes place outside of the United States. On the contrary, the Patriot Act was passed in response to the September 11 attacks, which occurred in New York and Washington D.C., and caused injuries within the United States.

Respondent's terrorism-related argument is particularly untenable because even before the Patriot Act was passed, Congress expressly created a private right of action to sue for injuries sustained as a result of a terrorist attack occurring abroad. Antiterrorism Act of 1990 ("ATA"), 18 U.S.C. §§ 2331-38, 2333 (2012). Like RICO, the ATA provides for treble damages for victims of international acts of terrorism. *Id.* Unlike the Second Circuit's interpretation of RICO, however, the ATA has a clear link to the United States—permitting only U.S. citizens to bring claims under the ATA. *Id.* ("*Any national of the United States* injured . . . by reason of an act of international terrorism . . . may sue . . . ." (emphasis added)). By contrast, under the Second Circuit's ruling here, for example, an Australian citizen with no connection to the United States could sue in the United States to recover damages for injuries suffered in Australia in a terrorist attack that was conceived of, planned, and took place in Australia. This takes RICO too far. Neither the plain language nor legislative history of RICO or the Patriot Act suggests that in making terrorism a RICO predicate, Congress intended for U.S. courts to

become responsible for adjudicating all of the world's civil claims arising out of terrorist acts worldwide. Had Congress intended to deviate so radically from its previous express decision to limit terrorism-related claims under the ATA to those brought by U.S. citizens, one would expect to see some evidence of that intention in either the Patriot Act's language or, at a minimum, in its legislative history. *See Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987) (applying the "dog that didn't bark" cannon to conclude that a statutory amendment having a substantial effect would have been evidenced in congressional discussions and legislative history); *City of Roncho Palos Verdes v. Abrams*, 544 U.S. 113, 132 (2005) (Breyer, J., concurring) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." (internal quotation marks omitted)). No such evidence exists here.

* * *

For the foregoing reasons, this Court should reject the Second Circuit's attempt to bootstrap the extraterritorial reach of RICO's predicates to justify permitting U.S. courts to adjudicate civil RICO claims seeking redress for foreign injuries. Moreover, even if the Court disagrees with all of the arguments above, the Second Circuit's reasoning still cannot overcome the Extraterritoriality Presumption. At the absolute most, the Second Circuit's reasoning suggests a *possibility*—and, *Amicus* submits, an unlikely one—that Congress intended to give RICO's private right of action extraterritorial reach by giving

certain RICO predicate statutes extraterritorial reach. This Court has held repeatedly, however, that a mere possibility that Congress intended for a statute to apply extraterritorially cannot overcome the Extraterritoriality Presumption. *See Morrison*, 561 U.S. at 264; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 253 (1991).

III. The Second Circuit's Holding Will Unduly Burden U.S. Businesses And Have Other Negative Consequences

If permitted to stand, the Second Circuit's ruling would not only create an end-run around this Court's holdings in *Kiobel* and *Morrison*, but would substantially increase litigation exposure for U.S. companies doing business abroad. Worse still, expanding the civil RICO remedy to encompass claims seeking redress for injuries sustained outside the United States will impose new and substantial burdens on foreign companies investing in the United States. As the International Chamber of Commerce has warned, the extraterritorial application of law "discourages international businesses from engaging in trade and investment." International Chamber of Commerce, *Policy Statement: Extraterritoriality and Business* 2 (2006), http://www.iccwbo.org/Data/Policies/2006/Extraterritoriality-and-business/ ("ICC Report").

A. The Second Circuit's Ruling Creates An End-Run Around *Kiobel* and *Morrison*

One perverse result of the Second Circuit's ruling is that it will likely resuscitate ATS claims that *Kiobel* would have otherwise barred. There is often significant factual overlap between ATS and RICO actions, and before *Kiobel*, litigants and

commentators noted RICO's potential use as a supplement to certain ATS claims. *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (alleging RICO and ATS claims based on a corporation's sales of military equipment to Israel); *Wiwa v. Royal-Dutch Petroleum Co.*, 226 F.3d 88, 93-94 (2d. Cir. 2000) (alleging both ATS and RICO claims based on companies' alleged role in perpetration of human rights abuses); Eric A. Engle, *Extraterritorial Jurisdiction: Can RICO Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question*, 3 J. High Tech. L. 1, 11 (2004) (discussing *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (action by residents of Myanmar under ATS and RICO for human rights violations allegedly committed by Myanmar government and Unocal)).

In particular, given the breadth of terrorism-support and money-laundering statutes, which are RICO predicates with extraterritorial reach, many ATS cases previously dismissed for lack of a sufficient U.S. nexus could now, under the Second Circuit's reasoning, survive as extraterritorial RICO claims. For example, in *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 753, 756 (N.D. Ill. 2014), plaintiffs brought suit under the ATS alleging, among other things, that an American corporation aided and abetted murder carried out by the Croatian military during the Yugoslavian civil war. The complaint specifically alleged that conduct relevant to the claims, including certain meetings between the defendants and members of the Croatian military, took place in Virginia. *Id.* at 754-55, 759. The District Court dismissed the complaint because the "primary conduct" giving rise to the plaintiffs' claim occured in

Croatia, and thus their claims were barred by the Extraterritoriality Presumption. *Id.* at 759. Similarly, in *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), the Eleventh Circuit applied *Kiobel* and dismissed, on extraterritoriality grounds, ATS claims alleging that Chiquita Brands acted in concert with Colombian paramilitary forces to commit acts of violence, including murder, in Colombia. *Id.* at 1188-89, 1191. Under the Second Circuit's ruling, however, the same conduct could support a viable claim under RICO if recast as a violation of one of the anti-terrorism predicates to RICO that have extraterritorial reach. *See, e.g.*, 18 U.S.C. § 1961(1)(G) (incorporating as RICO predicates offenses indictable under 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal Crime of Terrorism" to include offenses under 18 U.S.C. § 956(a)(1) (prohibiting any act "outside the United States" that would constitute the offense of murder or kidnapping in the United States))).

Tymoshenko v. Firtash, a case brought by the former prime minister of the Ukraine, also provides a useful illustration. 57 F. Supp. 3d 311 (S.D.N.Y. 2014). In that case, Yulia Tymoshenko alleged that the defendant, Dmytro Firtash, financed the election of Ms. Tymoshenko's political opponent, Viktor Yanukovych, and bribed various Ukranian officials to persecute Ms. Tymoshenko, resulting in her arrest and detention. *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *1 (S.D.N.Y. Aug. 28, 2013). The complaint alleged a violation of the ATS and a violation of RICO based on a pattern of, among other things, money laundering conducted through one of the largest banks in the Ukraine. *Id.* at *5. The district court dismissed the ATS claim

because it constituted an "impermissible extraterritorial application of the ATS." *Id.* at *4. Applying *Norex*, the District Court also dismissed the RICO claim as impermissibly extraterritorial but permitted the plaintiff to replead the RICO claim. *Id.* at *5. The district court later dismissed the second amended complaint but granted leave to replead, noting that under the Second Circuit's decision in this case, the plaintiffs may have been able to allege a viable RICO claim based on allegations that the defendants engaged in money laundering, a predicate act with extraterritorial reach. *Tymoshenko*, 57 F. Supp. 3d at 324-25.

Thus, one of the unintended consequences of the Second Circuit's decision is that claims found to be impermissibly extraterritorial, when brought under the ATS, may now be brought as civil RICO claims. And such claims may well capture extraterritorial conduct that would not have been actionable under the ATS. Indeed, while this Court has instructed that the ATS be applied in limited circumstances, *Sosa*, 542 U.S. at 720, courts have tended to interpret RICO broadly, *Sedima*, 473 U.S. at 497. To permit the Second Circuit's decision to stand would invite precisely the negative consequences that *Kiobel* was designed to avoid.

Similarly, the Second Circuit's decision creates at least a partial exception to *Morrison's* holding that Section 10(b) claims can be brought only in connection with domestic securities transactions. 561 U.S. at 267. After *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. 111-203, 124 Stat. 1376 (2010), which reversed *Morrison*'s holding, but only with respect to claims brought by the

Department of Justice and the Securities and Exchange Commission. *See* 15 U.S.C. § 78aa(b); *SEC v. Tourre*, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 n.4 (S.D.N.Y. June 4, 2013) ("[T]he Dodd-Frank Act effectively reversed *Morrison* in the context of . . . enforcement actions."). However, Congress expressly refused to overrule *Morrison*'s holding with respect to private actions, opting instead to study the issue further. *See* Dodd-Frank § 929(Y). Accordingly, in the wake of *Morrison* and Dodd-Frank, the government may bring securities-fraud actions based on securities transactions that occur outside the United States, but private plaintiffs may not.

The Second Circuit's decision, if permitted to stand, will create a partial end-run around *Morrison* and Congress's finely-tuned decision to permit only some kinds of securities-fraud cases to be brought in U.S. courts. The civil RICO statute expressly provides that when the government obtains a criminal conviction for fraud in connection with the purchase or sale of a security, the conduct underlying the fraud may then be used as the basis for a civil RICO claim. *See* 18 U.S.C. § 1964(c). Against this background, the Second Circuit's ruling would permit a private plaintiff to assert a RICO claim based on a foreign securities transaction—even though a private securities-fraud claim based on the same transaction would be barred by *Morrison*. And, as a bonus, the plaintiff would be able to recover three times the damages incurred—a remedy not available for securities fraud.

In sum, under the Second Circuit's decision, extraterritorial private claims—which this Court has found unfit for adjudication in the United States—will be permitted to proceed so long as they are

repackaged as a different cause of action. *Amicus* respectfully submits that this Court should not sustain such a broad interpretation of RICO's private right of action and should, instead, limit the private right of action to claims brought to obtain redress for injury suffered in the United States.

B. Permitting Civil RICO To Reach Claims Based On Foreign Injuries Poses Significant Risks To U.S. Businesses Doing Business Abroad And To Foreign Businesses Investing In The United States

If permitted to stand, the Second Circuit's ruling will impose substantial burdens on U.S. companies doing business abroad and on foreign businesses that invest in the United States. The Second Circuit's ruling not only opens the door to claims of the kind that this Court previously rejected in *Morrison* and *Kiobel*; it goes much further. RICO's breadth, both in terms of the sheer number of predicate offenses and the broad range of RICO's conspiracy provisions, means that under the Second Circuit's ruling, many claims with little if any connection to the United States may now be brought in U.S. courts. This exacerbates the problem identified by this Court in *Morrison* and *Kiobel*, because civil RICO—"the litigation equivalent of a thermonuclear device," *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)—offers private plaintiffs the staggering benefit of treble damages and attorneys' fees.

This is not a theoretical risk. Since the Second Circuit erased decades of precedent and concluded that RICO could have extraterritorial reach, courts have refused to dismiss RICO claims based on

everything from political oppression in the Ukraine, *see Tymoshenko*, 57 F. Supp. 3d at 324-25, to a European money-laundering scheme resulting in damage to Swiss nationals, *see Ixotic AG v. Kammer*, 09-CV-4345 (NG) (JO), 2014 U.S. Dist. LEXIS 180782, at *30-32 (E.D.N.Y. Sept. 30, 2014) ("At an earlier point in the proceedings, I expressed . . . concern that the RICO claims were defective because they impermissibly sought to apply the RICO Act extraterritorially. . . . Given the [*European Community* Panel's] focus on the racketeering acts rather than on the enterprise as such, I conclude that the plaintiffs have asserted RICO claims that are not impermissibly extraterritorial.").

These decisions represent a material shift in how civil RICO claims are treated by U.S. courts. Before the Second Circuit's ruling, courts routinely dismissed similar RICO claims. *See Adhikari v. Daoud & Partners*, 09-cv-1237, 2013 U.S. Dist. LEXIS 189601, at *22-26 (S.D. Tex. Aug. 23, 2013) (dismissing RICO claims stemming from a Jordanian entity's Middle East racketeering, which allegedly injured citizens of Nepal); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 542-46 (S.D.N.Y. 2013) (dismissing a RICO claim arising from a money-laundering scheme conducted in connection with the Oil-for-Food Program, which allegedly harmed the Republic of Iraq); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 167-68 (D.D.C. 2013) (dismissing RICO claims revolving around an extortion and money-laundering operation conducted in Kazakhstan, which allegedly caused harm there). As Judge Cabranes noted, after the Panel's decision, these claims would likely be "welcome[]" in "federal court." Pet. App. 72a n.8 (Cabranes, J., dissenting).

Moreover, the risk that civil RICO claims seeking redress for foreign injuries will proliferate is particularly troublesome because anything from product liability, *see In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011), to antitrust claims, *see In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013), to false advertising claims, *see* Complaint, *Bagert v. Volkswagen Grp. of Am., Inc.*, No. 2:15-cv-07174-JLL-JAD (D.N.J. Sept. 29, 2015), ECF. No. 1, can be framed as civil RICO claims. That only some RICO predicates have extraterritorial reach offers little relief. Ordinary business disputes can be—and when they arise in developing countries, frequently are—repackaged as claims of money laundering, a RICO predicate with extraterritorial application. *See, e.g. Hourani*, 943 F. Supp. 2d at 162-63, 167; *Iraq*, 920 F. Supp. 2d at 543; *Tymoshenko*, 2013 WL 4564646, at *1.

RICO's broad scope and the oft-noted abuse associated with a statute that authorizes treble damages and attorneys' fees only underscores the danger created by the Second Circuit's decision. *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241, 254 (3d Cir. 2012) ("In the criminal arena, this proclivity for abuse is at least limited by prosecutorial discretion, the risk of losing credibility with jurors if the prosecution engages in 'overkill' or overreaching, and the related risk of jury nullification. However, RICO's civil remedy is not restricted by any such considerations. Thus, it is not surprising that we are today faced with a claim that this landlord-tenant dispute is really a racketeering conspiracy that should entitle this tenant to treble damages under RICO."); *Fleet Credit Corp. v. Sion*, 699 F. Supp. 368,

377 (D.R.I. 1988), *rev'd on other grounds*, 893 F.2d 441 (1st 1990) ("[O]verbreadth is limited through prosecutorial discretion in [RICO] cases brought by the government, but in private actions a proper construction of the pattern requirement is all that constrains plaintiffs to obey Congressional intent."); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 588 (N.D. Cal. 1984) ("It is incumbent upon courts, especially in civil RICO actions where the restraint of prosecutorial discretion is not present, to scrutinize claims to insure that the statute is not applied to contexts outside those intended by Congress."); *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010) ("[P]laintiffs have often been overzealous in pursuing RICO claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations. In consequence, courts must 'strive to flush out frivolous RICO allegations at an early stage of the litigation.'").[7] The abuse endemic in civil RICO litigation only highlights the risk posed by the Second Circuit's decision, both to U.S. companies doing business abroad and to foreign businesses investing in the United States.

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[7] Even more troubling, the Panel's reasoning has been used not only to extend the reach of civil RICO; it has also been used to extend the reach of other federal statutes that refer to criminal predicates with some extraterritorial application, such as Section 924(c) of the Firearms Act, 18 U.S.C. §§ 921-31, *see United States v. Ahmed*, 94 F. Supp. 3d 394, 413 (E.D.N.Y. 2015) (based on the Panel's ruling, "[n]either *Morrison* nor *Kiobel* requires Congress to employ some talismanic language to rebut the presumption against extraterritoriality. Rather, the Court may look to the structure of the statute and with it, its incorporated predicate statutes, to determine whether the presumption against extraterritoriality has been rebutted.").

1. The Potential For Extraterritorial Civil RICO Enforcement Places Significant Burdens On NFTC's Members

Permitting U.S. courts to adjudicate claims based on foreign conduct and seeking redress for foreign injury will impose substantial burdens on NFTC's members. As noted above, conduct that is legal in foreign jurisdictions may now not only be subject to suit in the United States, but may result in U.S. businesses' facing class actions seeking triple recoveries under civil RICO. The problem is particularly acute for financial institutions and companies doing business in developing countries, where garden-variety business disputes often involve allegations of money laundering, a RICO predicate with extraterritorial reach.

Moreover, litigating cases involving foreign plaintiffs and foreign injuries imposes unique burdens on American businesses. Obtaining discovery from foreign sources is invariably expensive, cumbersome, and difficult, and almost always results in a dramatic increase in the cost of litigation. Courts have acknowledged as much, observing that foreign discovery imposes "financial hardships" and "significant delays" on parties and on the courts. *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009). And the high cost posed by international discovery and the potential for treble damages ensures that once a case passes the motion-to-dismiss stage, companies will be under tremendous pressure to settle—even if the case lacks any merit. In this way, civil RICO litigation "presents a danger of vexatiousness different in degree and in kind from

that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). Faced with an ever-present risk that their legitimate business dealings in foreign countries will result in U.S. litigation, many companies may opt to disengage from developing countries—yielding those business opportunities to their foreign competitors and undermining their competitive position.

2. The Potential Of Extraterritorial Civil RICO Enforcement Presents Extraordinary Risks For Foreign Corporations Considering Investment In The United States

Permitting civil RICO claims based on foreign injury will also deter foreign investment in the United States. Foreign direct investment is vital to the U.S. economy: it creates jobs for Americans, and increases the availability, and decreases the cost, of capital. But the increased exposure to litigation risk caused by the extraterritorial application of U.S. law discourages foreign investment because corporations are reluctant to place themselves within the jurisdiction of U.S. courts. *See* ICC Report at 2.

Indeed, as *Amicus* can attest, and as American policy-makers and scholarly studies have repeatedly confirmed, potential U.S. class-action litigation is high among the concerns of would-be investors in the United States. *See* Sen. Jon Kyl, *A Rare Chance to Lower Litigation Costs: A Federal Committee Wants to Hear Your Ideas On the Subject. Speak Up.*, WALL STREET J., (Jan. 20, 2014, 6:21 PM) http://www.wsj.com/articles/SB10001424052702304049704579321003417505882 ("[E]xcessive litigation costs . . . make foreign companies reluctant to invest

here."); Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, Internatinal Trade Administration, 2 (Oct. 2008), http://trade.gov/investamerica/Litigation_FDI.pdf ("Fear of litigation and potential liability under the U.S. legal system are among the more important concerns to those interested in investing in the United Sates."); *Excessive Litigation's Impact on America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 11 (2013) (Statement of Paul J. Hinton, NERA Economic Consulting) ("Many foreign companies are wary of becoming embroiled in U.S. litigation, which may deter foreign direct investment."); Michael R. Bloomberg & Senator Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 16, (2007) http://www.nyc.gov/html/om/pdf/ny_report_final.pdf; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (class actions, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law"). Under the Second Circuit's holding, foreign citizens are now able to come into U.S. courts to seek redress for foreign injuries, even when no such cause of action is available in their home jurisdictions. *Cf. Empagran*, 542 U.S. at 167 ("[T]o apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes.").

This case illustrates the litigation abuse that businesses with contacts in the United States, which

are subject to the jurisdiction of U.S. courts, will now be forced to confront. The European Commission, and those of its member states that have joined this action, have declined to enact legislation of the kind at issue here. Even though the alleged misconduct took place in Europe, Respondents are apparently unable, or unwilling, to litigate their claims in any European jurisdiction and so bring their claims in the United States.[8] That alone points to a deep conflict between the laws of this country and those of Respondents' home jurisdictions. Indeed, noting that many European countries have made different regulatory and policy choices from the United States, many of the Respondents here have previously objected to the extraterritorial application of U.S. law. *See, e.g.*, Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 1, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) ("The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil."); Brief for the Republic of France as *Amicus Curiae* in Support of Respondents at 1-3, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Petition for a Writ of Certiorari at 1-2, *Empagran*, 542 U.S. 155 (No. 03-724).

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[8] While in this case, the European Commission seeks to invoke the statute for conduct that occurred abroad, any victory would be "pyrrhic," because "its citizens . . . are among the likely targets of future RICO actions under the panel's interpretation of the statute." Pet. App. 70a (Cabranes, J., dissenting).

This Court has worried about the potential for U.S. laws with extraterritorial reach to discourage foreign investment. That concern—previously expressed in connection with antitrust and securities laws, and in connection with the ATS—is particularly pronounced in the case of civil RICO claims because of the type of liability at issue, which contemplates not only class actions, but also class actions seeking treble damages. The courts of this country simply cannot, and should not, become the forum to ventilate the whole world's complaints, much less the complaints of foreign sovereigns that have elected not to enact similarly sweeping legislation at home.

CONCLUSION

For the foregoing reasons, and those in the Petitioners' brief, the Court should reverse the decision below.

Respectfully submitted,

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